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State of Utah v. Herbert Landry : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. HERBERT LANDRY, Defendant/Appellant.	CASE NO. 20070075-CA **APPELLANT IS INCARCERATED**

REPLY BRIEF OF APPELLANT

APPEAL FROM CONVICTION, JUDGMENT, SENTENCE AND ORDER FOR COMMITMENT, IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE STEVEN L. HANSEN PRESIDING.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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SUMMARY OF ARGUMENT

Mr. Landry has met his burden of marshaling all of the evidence that could be construed as supporting the jury verdict in this case. However, even when considering all of the evidence in a light most favorable to the jury verdict, it is still insufficient to establish beyond a reasonable doubt that Mr. Landry committed the crime of aggravated arson.

ARGUMENT

I. MR. LANDRY HAS MARSHALED ALL OF THE RELEVANT EVIDENCE.

The State argues that Mr. Landry failed to meet his marshaling burden on this appeal. BRIEF OF APPELLEE ("Br. Appe.") at 12-21. Specifically, the State claims Mr. Landry failed to marshal the evidence of Mr. Landry's alleged "hurried retreat from his burning apartment" (*Id.* at 15), and the "evidence in support of the

inference ... that defendant started the fire not with a heptane-based ignitable liquid, but with alcohol." *Id.* at 20. The State argues that this allegedly unmarshaled evidence suggests "the fire was intentionally set" and Mr. Landry was the one who set it. *Id.*

There are several flaws in the State's argument failure-to-marshal argument. Mr. Landry did marshal the evidence that the State believes is significant, including a witness' testimony that he saw Mr. Landry "hurriedly walk[] by five minutes before the fire." BRIEF OF APPELLANT ("Br. Appt.") at 5. Further, while part of Mr. Landry's defense was that the fire was started accidentally with alcohol, during it's case in chief, the State presented evidence to suggest that Mr. Landry intentionally started the fire using a heptane-containing substance.

Rex Nelson, a State's witness and fire investigator with Unified Fire in Salt Lake City, testified that his accelerant detection canine, Oscar, was trained to detect various ignitable liquids, but not including alcohol. R118:101-03, 107, 111. Oscar purportedly alerted in three different locations inside the southeast bedroom where the fire originated. R118:104-05, 137. Oscar also purportedly alerted on one of Mr. Landry's socks and one of his shoes, although there was no crime lab report indicating any flammable substance in those items. R118:106. The State's own evidence was that Oscar would not have alerted if alcohol was the flammable liquid used to start the fire because Oscar was not trained to detect alcohol, and

because any traces of alcohol would have dissipated or would have been undetectable as a result of the volume of water used to put out the fire. R118:169.

The Orem City fire marshal, Russ Sneddon, testified for the State that several items were sent to the crime lab and tested positive for heptane, a substance found in a variety of primarily petroleum based ignitable liquids. R118:153. Sneddon testified that in his opinion the fire was intentionally set by the ignition of an ignitable liquid that was poured onto the floor of the bedroom. R118:143. When eliciting this testimony, the State admitted two canisters into evidence containing samples taken from the scene and specifically elicited testimony that heptane was found in those samples, thereby indicating to the jury that a heptane-containing ignitable liquid was used to start the fire. R118:155-56.

The idea that alcohol was the ignitable fluid was actually presented as part of Mr. Landry's defense when he testified that alcohol was spilled on the bedroom floor the day before the fire and in approximately the same locations where the fire originated. R119:14-15. Mr. Landry's friend, Josephine, was smoking in that room just prior to the fire. R119:16. The State claims that alcohol spilled the night before would no longer have been present. Br. Appe. at 20 (citing Marshal Guynn's testimony).

However, the State's claim is not an accurate reflection of the evidence. Marshal Guynn actually testified that he could not "give an exact time of evaporation rate of alcohol. I would struggle with, if it happened on Saturday, even late Saturday night, still being present Sunday in the afternoon. But again, it

could not – if that – if those vapors were ignited they are instantly converted to flaming combustion and the people present would know." R119:29. Marshal Guynn also testified that ignitable vapors would not smolder, they would "explode[.]" R119:28.

In short, it was not the State's primary theory at trial that the fire was started using alcohol.[1] To the contrary, the State presented evidence to rebut this claim and Provo City fire marshal, Jim Guynn, admitted on cross-examination that the State had no idea what flammable substance was used to start the fire. R118:191. Thus the State presented evidence suggesting the likelihood that Oscar alerted on a heptane-containing substance that was used to start the fire, admitted physical evidence containing heptane, and presented evidence in an attempt to rebut Mr. Landry's defense that alcohol spilled the night previous to the fire was the ignitable liquid that caught fire. R119:15; *see also*, Br. Appt. at 14 (wherein Mr. Landry stated his belief "that the alcohol spilled on the floor was in about the location that testimony indicated the fire originated").

Based on the foregoing evidence marshaled, the State's claim the Mr. Landry failed to marshal the evidence fails.

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[1] The State cites non-existent "evidence" that Mr. Landry supposedly failed to marshal when it recites Marshal Guynn's testimony and basically fills in the blanks to support the State's hindsight theory of the case: "Well, [the crime laboratory] did identify a hydrocarbon there [---heptane], but they didn't identify one [---alcohol---] that I would think is responsible for the ignitable pour." Br. Appe. at 21 (citing and adding to R118:170). Mr. Landry is not required to marshal the State's self-serving factual embellishments to the trial record.

a. Response to miscellaneous facts described by the State as Mr. Landry's "challenged and doubtful testimony."

The State believes it is significant that, while Mr. Landry claimed to have lost everything in the fire, Mr. Sneddon reported few items of debris were found in the apartment after the fire, and the clothes closet had little fire debris. Br. Appe. at 16. The State finds this purported evidence significant only on this appeal, as it was not an issue at trial. In fact, Rex Nelson testified that after Oscar alerted three times in the bedroom where the fire originated, Oscar had to be taken out of the room because there was a lot of fire debris that needed to be removed or excavated. R118:105. There is no evidence as to what the removed debris was comprised of or if it included the remains of a suitcase; and it is unlikely there would have been much debris in the bedroom clothes closet as Mr. Landry testified he had packed a suitcase with his clothes. R119:13, 24-25.

The State also finds it significant that during his interview with Provo City Officer Drew Hubbard, Mr. Landry reportedly did not express concern for his personal belongings. Br. Appe. at 17. The State omits mentioning that when Mr. Landry was interviewed by Officer Hubbard, Mr. Landry was considered and treated as a suspect of aggravated arson. R118:124 ("I was there looking to see if this was criminal in nature."). Given the likely accusatory tone of such an investigation, it is not surprising if a suspect does not express concern about his personal belongings, particularly when he owns so few, as Mr. Landry did here. R119:13 (Mr. Landry, a survivor of hurricane Katrina, had procured two television

sets, a DVD player, a VCR, a bed, a few clothes and some medicine during his short stay).

The State also claims that Mr. Landry failed to show up for a walk-through of his apartment scheduled "with the building manager the night he was to quit the premises." Br. Appe. at 17. This claim misstates the evidence and puts Mr. Landry's actions in a false light. Mr. Landry testified that when he left the apartment prior to the fire, he left his clothes in a suitcase on the floor because he intended to return to the apartment at 9:00 p.m. when the walk-through was scheduled. R119:24. The fire occurred around 5:00 p.m. and the walk-through was scheduled for 9:00 p.m. R118:89-90, 93-94. Notwithstanding the fact that Mr. Landry did return to the scene upon learning about the fire, it was obviously impossible for him to do a walk-through of the apartment at that point.

While visiting a friend at a motel, Landry saw the fire on television and immediately returned to the apartment building, hoping to retrieve his medicine. R119:19. Once he arrived back on the scene, Mr. Landry was taken into custody and questioned by police and fire investigators. *Id.* Therefore, it inaccurately portrays the record facts to argue that Mr. Landry intentionally failed to show up for the 9:00 p.m. walk-through. The State's claim that this purported failure to keep his appointment is evidence of Mr. Landry being "incredible, untrustworthy, and irresponsible" (Br. Appe. at 17) is not supported by the record and is disingenuous. Mr. Landry had been taken by State investigators to another

location where he was interrogated and his clothing was taken into evidence. R118:162, 174-75; R119:27.

The State cites additional evidence that Mr. Landry allegedly failed to marshal, which evidence tends to show the fire was incendiary in nature. However, the State admits that Mr. Landry frankly states in his opening brief that the State's witnesses reached this conclusion based on burn patterns. Br. Appe. at 18. The State then recites additional and various evidentiary items that Mr. Landry allegedly failed to marshal. However, all of this evidence was marshaled in Mr. Landry's opening brief. Br. Appt. at 10 (nothing suggesting an accidental cause, such as unattended candle, discarded lighter material, or malfunctioning electrical equipment was found; burn patterns were indicative of a poured ignitable liquid; no container for such a liquid was found; a cigarette-type lighter was found outside of the apartment); 11 (Mr. Landry "answered in the negative" when asked about smoking materials, problems with electrical components, and chemicals which could decompose and self-heat, in addition to other possible accidental causes).

There is nothing in the foregoing to support the State's claim that Mr. Landry is not credible. Further, none of the State's "marshaled" evidence is sufficient to find beyond a reasonable doubt that Mr. Landry committed a crime.

II. THE CIRCUMSTANTIAL EVIDENCE IN THIS CASE WAS INSUFFICIENT TO MEET THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT.

Mr. Landry did not argue in his opening brief that a different standard than proof beyond a reasonable doubt should apply here or in any other criminal case. The State also does not deny "the existence of a reasonable hypothesis of innocence necessarily raises a reasonable doubt as to the defendant's guilt." Br. Appt. at 17 (citing and quoting *State v. Layman* 953 P.2d 782, 786 (Utah App. 1998) (quoting *State v. Hill*, 727 P.2d 221, 222 (Utah 1986). The Utah Supreme Court's subsequent decision in *State v. Layman* 985 P.2d 911 (Utah 1999) simply found application of the reasonable hypothesis principal "problematic and unnecessary" in that case because a sufficiency analysis was adequate. *Id.* (upholding this Court's decision that the evidence was insufficient to support the verdict).

In fact, the reasonable hypothesis test does not create a new standard of proof. It is simply another way of restating the State's existing burden of proving every element of a charge beyond a reasonable doubt when the evidence is purely circumstantial as in this case. In that event, a reasonable hypothesis of innocence creates reasonable doubt. *State v. Hill*, 727 P.2d 221, 222 (Utah 1986) (holding that because there was no direct evidence that Hill committed the crime, the existence of a reasonable hypothesis of Hill's innocence meant there was reasonable doubt).

There is no direct evidence in this case that Mr. Landry committed aggravated arson. All of the evidence is circumstantial and the State can cite no direct evidence to support the verdict in this case. The defense presented evidence of another unidentified individual who appeared on the scene immediately prior to the fire and after Mr. Landry had left the premises. R119:6-7. The State's own evidence supported the possibility that alcohol spilled the night prior to the fire may not have completely evaporated. R119:29. Further, the State's own witness admitted on cross-examination that a smoldering cigarette could have ignited an ignitable fluid spilled on the floor. R118:191. The defense further established that Mr. Landry returned to the scene upon learning of the fire (R118:105-06, 150, 174; R119:19, 20), an unlikely behavior for one who would perpetrate such a crime.

All of this evidence supports two reasonable hypotheses that (1) someone besides Mr. Landry started the fire; or (2) the fire was started unintentionally and unbeknownst to Mr. Landry, with a smoldering cigarette after he and Josephine left the apartment.

Even without these reasonable hypotheses of Mr. Landry's innocence, there is insufficient evidence to support the verdict in this case. The circumstantial evidence is not "*of such a quality and quantity* as to justify a jury in determining guilt beyond a reasonable doubt" (*State v. Nickles*, 728 P.2d 123, 126-27 (Utah 1986) (emphasis added). The State cites *State v. Linden*, 657 P.2d 1364 (Utah

1983) (per curiam) as an example of where "the defendant's nexus to the fire was much the same as in this case." Br. Appe. at 26.

However, *Linden* is readily distinguishable from these facts. One witness saw Linden run from the scene of the fire while another witness identified Linden's car (including the license plate number) in a restaurant parking lot adjacent to the fire. *Id.* at 1366-67. Another witness testified he saw Linden at the scene about two weeks prior to the fire. *Id.* Despite this evidence, Linden proffered an alibi defense and testified he was in California at the time of the fire. He also testified he had not been to Utah for several years, although he was in possession of a traffic citation issued him in Utah when he was interviewed by investigators. *Id.*

Unlike *Linden*, there is no evidence that Mr. Landry testified falsely in this case. No eyewitness saw Mr. Landry run from the fire. Mr. Landry did not falsely claim to be in a different state when the fire erupted. Therefore, *Linden* is not factually similar to this case and the State was able to meet its burden of proof by presenting persuasive evidence that Linden was untruthful about his whereabouts.

The State's evidence in this case is substantially weaker than that in *Linden*. There is no evidence that Mr. Landry was untruthful in his testimony. There is no direct evidence linking him to the fire. It is all circumstantial and insufficient to establish proof beyond a reasonable doubt.

The State summarizes the evidence that it believes amounts to proof beyond a reasonable doubt that Mr. Landry deliberately set the fire as follows: (1)

Mr. Landry was seen leaving in a hurried manner 5 minutes prior to the fire being discovered; (2) there is no evidence that Mr. Landry lost items of personal property he claimed to have in his possession; (3) there is no evidence that a smoldering cigarette may have ignited alcohol spilled on Mr. Landry's bedroom floor, or that he had thought of that possibility when he was interviewed immediately after the fire; (4) Mr. Landry "showed little concern for his lost property immediately after the fire"; and (5) Mr. Landry "manifested ... a disregard for the property he was renting" because he had previously broken a window to gain entry and his door was broken during an altercation with another individual. Br. Appe. at 28.

Each of these bases outlined by the State can be refuted individually and collectively. The mere fact that Mr. Landry appeared to be in a hurry to leave 5 minutes prior to the fire being discovered is not sufficient to establish beyond a reasonable doubt that he deliberately set the fire. The State's second claim that items of Mr. Landry's personal property were not found in the debris is not true.[2]

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[2] "Q: Did you find remnants of suitcases or boxes or anything like that?
A: I don't recall, specifically. ... I recall a portion of the stool, burnt umbrella, a pile of clothing." (R118:149).

" ... there were very few things in that room to burn, a few clothes, there was a couple of small furniture items, the mattress, and the floor coverings ..." (R118:171).

"I had two T.V.'s, I had my clothes, my medicine, my diabetes medicine, my pressure medicine, my blood pressure medicine. I had a DVD player, a VCR, my bed. I had a coat my daughter bought me. I had clothes and shoes. I lost – I lost everything. Everything." (R119:13).

Further, Mr. Sneddon testified that a lot of debris had to be removed from the bedroom. R118:105. It is not clear what this debris was comprised of or if that removal took place prior to photographs being taken of the scene. Regardless, no witness for either the prosecution or the defense testified that there was no suitcase.

The State's third item of evidence offered as proof beyond a reasonable doubt that Mr. Landry started the fire is similarly unpersuasive. The State's own witness, Marshal Guynn, testified that a smoldering cigarette could have ignited a combustible liquid on the floor. R118:191. And while he expressed doubt that any alcohol spilled the night before would still be present, Marshal Guynn still could not rule out that possibility because he did not know the evaporation rate or what kind of alcohol might be involved. R119:29-30. Presumably, the evaporation rate would be affected by the amount of alcohol spilled, for which there is no evidence.

The final facts that the State claims support a finding of proof beyond a reasonable doubt are even less persuasive and are irrelevant. The purported fact

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"Q: You are telling us you'd left all of your clothes and all of your belongings in the apartment up until that time, you hadn't moved anything out.
A: No, sir.
Q: Can you explain why the photographs of the closet don't show any burned clothes?
A: Because the clothes were in a suitcase on the floor.
Q: Can you explain why we don't see any evidence of that?
A: I guess it got burned up." (R119:24-25).

that Mr. Landry, a Katrina survivor who possessed very little as a result of that ordeal, did not express concern about the loss of his minimal personal property to the police officer who was investigating him for arson does not prove anything, even to a preponderance standard. Further, even if it was relevant, the sketchy evidence that Mr. Landry had to break a window to get into his own apartment and that his door was broken during an altercation with another individual does not suggest he his not credible and certainly does not prove he had a disregard for the property he was renting.[3]

The foregoing five circumstantial, and in some instances, irrelevant bases offered by the State as proof beyond a reasonable doubt that Mr. Landry committed the crime of aggravated arson are insufficient. Yet Mr. Landry has been deprived of his fundamental right of liberty on this tenuous evidence. While an argument might be made that this evidence may meet the preponderance standard, it falls far short even of clear and convincing. It is facially insufficient to establish proof beyond a reasonable doubt that Mr. Landry committed the crime for which he has been convicted.

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[3] In response to Mr. Landry's point that a motive to commit arson cannot be inferred from the bare fact that the defendant was facing eviction, the State responds "that an eviction may well motivate arson." Br. Appe. at 28. The State's argument is not responsive to Mr. Landry's point, which is that a motive to commit arson cannot be presumed merely from a pending eviction. There must be extraneous evidence tending to prove that motive.

CONCLUSION

Even when construed in a light most favorable to the verdict, the evidence in this case is insufficient to establish beyond a reasonable doubt that Mr. Landry committed the crime for which he has been convicted. Accordingly, Mr. Landry respectfully asks this Court to so find and to vacate his conviction.

Respectfully submitted this 17th day of October, 2008.

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CERTIFICATE OF DELIVERY

I hereby certify that on this 17th day of October, 2008, I caused to be hand-delivered two (2) true and correct copies of the foregoing Reply Brief of Appellant to the following:

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